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**DEPARTMENT OF HOMELAND SECURITY
U.S. Customs and Border Protection**

19 CFR Part 162

Docket No. USCBP-2011-0022

CBP Dec. 13-04

RIN 1651 – AA94

Internet Publication of Administrative Seizure and Forfeiture Notices

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This final rule adopts, with one change, a notice of proposed rulemaking (NPRM) published in the **Federal Register** on February 8, 2012, that proposed to allow for publication of notices of seizure and intent to forfeit on an official U.S. Government forfeiture Web site. CBP anticipates that this rule's amendments will reduce administrative costs and improve the effectiveness of CBP's notice procedures as Internet publication will reach a broader range of the public and provide access to more parties who may have an interest in the seized property.

DATES: Final Rule effective [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Dennis McKenzie, Director, Fines, Penalties and Forfeitures Division, Office of Field Operations, U.S. Customs and Border Protection, (202) 344-1808.

SUPPLEMENTARY INFORMATION:

Background

On February 8, 2012, CBP published in the **Federal Register** (77 FR 6527) a proposed rule to amend title 19 of the Code of Federal Regulations (19 CFR) regarding the manner by which CBP provides notice of intent to forfeit seized property appraised at more than \$5,000 and seized property appraised at \$5,000 or less. CBP proposed to utilize the Department of Justice (DOJ) forfeiture Web site, located at www.forfeiture.gov, to post seizure and forfeiture notices for property appraised in excess of \$5,000 in value for 30 consecutive days, including seizures by the U.S. Border Patrol,¹ where appropriate. The DOJ forfeiture Web site currently contains a list of pending notices of civil and criminal forfeiture actions in various district courts and Federal Government agencies. Under the proposed regulation, CBP would no longer be required to publish administrative seizure and forfeiture notices for three successive weeks in a newspaper circulated at the CBP port and in the judicial district where CBP seized the property. CBP would continue to provide direct written notice to all known parties-in-interest of the seizure/forfeiture action and include the web site posting address and the expected dates of publication in that notice.

To retain flexibility in the process pertaining to the higher-valued merchandise (appraised at more than \$5,000), CBP proposed to retain the discretion, as circumstances warrant, to publish additional notice in a print medium for at least three successive weeks. For example, CBP would have the discretion to publish a notice of seizure and forfeiture in a newspaper in general circulation at the port and the judicial district nearest the seizure, or with wider or national circulation, when recommended by the pertinent

¹ Please note that the agency's formal designation is the U.S. Border Patrol (or USBP), while the CBP Headquarters element of the Border Patrol is known as the Office of Border Patrol (OBP). Officers of the USBP are commonly referred to as either Border Patrol agents or Border Patrol officers.

U.S. Attorney's office or court of jurisdiction. Also, CBP would have the discretion to publish notice of seizure and forfeiture in a non-English language or other community newspaper to ensure reaching a particular community that may have a particular interest in or connection to the seizure. Similarly, CBP would have the discretion to publish notice of seizure and forfeiture in a trade or industry publication that serves a particular commercial community to ensure reaching a party when it is difficult to identify a vessel or other conveyance owner.

Under the proposed rule, CBP also would publish seizure and forfeiture notices on the DOJ forfeiture Web site for 30 consecutive days for seized property appraised at \$5,000 or less. This additional notice would not replace the current procedure of CBP posting notice at the customhouse nearest the place of seizure. However, the proposed amendment would specify that in situations where Border Patrol agents make the seizure, the posting would be at the appropriate Border Patrol sector office.

Benefits of Internet Posting

As explained in the NPRM, CBP believes that using the Internet to publish CBP seizure and forfeiture notices will provide notice to a broader range of the public without the geographical limitations that exist under the current procedure's reliance solely on local print publications or customhouse postings. Under this final rule, Internet posting will be available for a longer period of time (30 days) compared to the minimum statutory requirement of three weeks (21 days). This final rule provides CBP the discretion to publish notice in a print medium when CBP determines that additional outreach would be appropriate. In addition to these advantages, CBP expects that Internet publishing will provide savings to the Government.

Discussion of Comments

CBP solicited public comments on the proposed rulemaking and ten commenters responded. The comments are set forth and discussed in this section.

CBP notes that, at the request of representatives from the newspaper industry, DHS held a listening session on April 12, 2012. Newspaper industry representatives orally presented the substance of two written documents which are available in the docket for this rule under “Supporting and Related Materials.” One of the documents is a copy of a previously submitted comment (see Docket USCBP-2011-0022-0012, dated April 9, 2012, which is discussed below).

Favorable Comments

Most of the comments were supportive of the proposed amendments, citing several of the reasons that CBP set forth as the basis for the proposal: reduced cost to the government and the ability to reach more potentially interested persons. Also, these commenters identified, as advantages of the proposal, the following factors: the increased efficiency and wide availability of the Internet, enhanced government transparency, the shrinking newspaper market (fewer newspapers and newspaper consumers), the increasing costs associated with newspaper advertising, and CBP’s flexibility to use newspaper advertising in appropriate circumstances. Two commenters pointed out how the proposed amendment serves the purposes of Executive Order (E.O.) 13576, entitled Delivering an Efficient, Effective, and Accountable Government, wherein the President encourages Federal Government agencies to cut waste, streamline structure and operations, and reinforce performance and management reform. These commenters

suggested that the switch to Internet publishing would enhance government efficiency through use of technology and thereby improve customer service.

Unfavorable Comments or Recommendations to Improve the Regulation

The following comments expressed objections to the proposed rule or made recommendations to improve the effectiveness of the proposed rule. A description of these comments, together with CBP's analyses, is set forth below.

Comment: One commenter, agreeing that Internet posting is an effective replacement for newspaper advertising of seizure and forfeiture notices, recommended reducing the time period for posting notice to less than 30 days. Another commenter recommended increasing the posting time period to more than 30 days. The former commenter identified speeding up the process as a worthy goal, and the latter commenter favored providing more time so that unknown interested parties could learn of the seizure and act on the posted information.

CBP Response: CBP believes that the proposed 30-day Internet post time strikes the right balance, as it provides adequate notice to the public and a reasonable time frame for responsibly resolving seizures and forfeitures with appropriate dispatch. Both are important concerns for CBP, interested parties, and the public. CBP notes that the 30-day posting time period is more than a week longer than the previous regulatory posting of three weeks for newspaper publication.

Comment: One commenter, agreeing with the proposal's provision to allow CBP discretion to publish notice in a foreign language newspaper when appropriate in the circumstances, recommended that this publication option be included explicitly in the regulatory text.

CBP Response: CBP believes that it is not necessary to include in the regulatory text the foreign language newspaper option or any of the alternative print publication options discussed in the preamble of the NPRM. CBP set forth these options as non-exclusive examples of circumstances that might warrant, at CBP's discretion, additional publication. As there may be other circumstances that recommend, on a case-by-case basis, other print publication options, CBP believes that the regulation need not be explicit in this respect.

Comment: One commenter recommended that known parties-in-interest be notified prior to the 30-day Internet notice period so that they will have adequate time to consult the DOJ forfeiture Web site for information.

CBP Response: Under the current regulation and practice, CBP sends a written seizure and forfeiture notice to known parties-in-interest in advance of the notice's publication in a newspaper. Under the amended regulation, CBP will continue to inform known parties-in-interest prior to a notice's publication on the Internet. The direct written notice to all known parties-in-interest provides these parties with the information they need to respond, including information about the seized merchandise and the place of seizure, alternative courses of action from which to choose, relevant information with which to make an informed decision, direction to the DOJ forfeiture Web site and the dates of publication of the notice on the web site and, if print publication is appropriate, the name of the publication that will publish the notice and the dates of the print publication.

Comment: Three commenters, including newspaper industry representatives, expressed concern that the absence of notice in a local newspaper would disadvantage people who would not know to consult a Federal Government Web site. (Other comments by the

newspaper industry are discussed in more detail further below.) One of these commenters recommended, in regard to seizures of higher-valued merchandise, that CBP post the notice at the customhouse or the U.S. Border Patrol sector office as a measure to alleviate the absence of local newspaper notice.

CBP Response: CBP does not believe that the change to Internet publishing will significantly disadvantage people living in the locality of the seizure (the port district and court jurisdiction nearest the place of seizure). In recent decades, the circulation of printed newspapers has continued to decline. Research by The Pew Research Center estimates that daily circulation of printed newspapers has declined 30%, from 62.3 million in 1990 to 43.4 million in 2010.² Additionally, a significant rise in Internet usage has coincided with the decline in newspaper circulation. Since 2003, these trends have accelerated. Statistics from a Department of Commerce report on the subject show that “an estimated 209 million Americans – about 72% of all adults and children aged three years and older – use the Internet somewhere, whether at home, the workplace, schools, libraries, or a neighbor’s house.”³ Internet use through libraries provides the most widespread availability of free regular Internet access to the general public. The American Library Association’s Public Library Funds & Technology Access Study (2010-2011) reports that 99.3% of public libraries offer public access to computers and the Internet.⁴ According to a study by the University of Washington, a third of

² Pew Research Center, The State of the News Media 2011, at 8, available at <http://www.stateofthemedia.org/2011/newspapers-essay/data-page-6>.

³ U.S. Department of Commerce, National Telecommunications and Information Administration, Digital Nation—Expanding Internet Usage (Digital Nation), available at http://www.ntia.doc.gov/files/ntia/publications/ntia_internet_use_report_february_2011.pdf.

⁴ John Carlo Bertot, et al., Libraries Connect Communities: Public Library Funding & Technology Access Study 2010–2011 (Libraries Connect Communities), at 3, available at <http://viewer.zmags.com/publication/857ea9fd>.

Americans 14 years old and older, or about 77 million people, use public library computers.⁵

Thus, CBP believes that in those instances when Internet posting is the sole notice provided, it will be fully adequate to meet substantially the purpose for which administrative seizure and forfeiture notice is intended – to provide, to as many of the public at large as can reasonably be expected to be interested, access to important information regarding seizures and forfeitures of imported merchandise. In addition, Internet publishing provides the potential to reach unknown interested parties outside the local jurisdiction. Given the widespread use of the Internet in our mobile society, CBP believes that this expansion of the seizure and forfeiture notice’s reach will enhance the process and yield positive results.

Also, CBP retains the discretion to publish additional notice in print media, including local newspapers, in appropriate circumstances. Non-exclusive examples include when the U.S. Attorney’s Office or the local court of jurisdiction recommends such publication or when publication in a foreign language paper or a trade or industry publication is deemed appropriate in a given situation. CBP is not precluded from using print media in other circumstances it deems appropriate to meet a legitimate public outreach purpose that justifies the expense. Further, the bulk of the cost attributable to additional print publication will derive from the highest profile cases (see “Economic Analysis” section). This means that notice in most higher-interest seizure/forfeiture cases will likely be published in both Internet and newspaper formats. Thus, collectively, these

⁵ Samantha Becker, et al., *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries (Opportunity for All)*, at 32, available at http://impact.ischool.washington.edu/documents/OPP4ALL_FinalReport.pdf.

instances of additional print/newspaper publication in the exercise of CBP discretion will generally reduce the local impact, should there be any, of moving away from routine newspaper publication to routine Internet publication.

In addition, the CBP Web site, which provides general information on seizures and forfeitures, among other things, will provide advance notice of the change to Internet publishing of seizure and forfeiture notices and include a link to the DOJ forfeiture Web site. A person who may not be aware of a government web site specifically devoted to seizures and forfeitures may think of consulting the CBP Web site for information on this subject, as CBP is widely known as the government agency that administers and enforces laws pertaining to imported merchandise. CBP believes that much of the audience that has for many years consulted the legal notice section of local newspapers to view information on seizures and forfeitures is almost certainly aware of the CBP Web site.

Also, while CBP is not adopting in this final rule the commenter's suggestion to post notice of specific higher-valued seizure/forfeiture cases at the appropriate customhouse or U.S. Border Patrol sector office, CBP will post information at these places, in a conspicuous place accessible to the public, to inform the local public of the DOJ forfeiture Web site and its listing of specific CBP seizure/forfeiture actions, regardless of the value of the seized merchandise. This will provide, in all CBP ports and U.S. Border Patrol sectors, a locally posted source of information relative to the higher-valued seizures, albeit without information specific to individual cases. This posting may additionally reduce the impact of reduced local newspaper publication of seizure and forfeiture notices. Language regarding the placement of this general notice at the customhouses and sector offices has been added to the regulatory text in this final rule.

Further, after publication of this final rule, CBP intends to publish notice for five successive weeks in all newspapers it currently uses for publishing seizure and forfeiture notices in 42 CBP ports, and in newspapers local to 20 U.S. Border Patrol sector offices, to inform the readership of those newspapers that information regarding CBP seizures and forfeitures may be obtained through the DOJ forfeiture Web site on and after January 2, 2013.

Finally, CBP expects that, on the whole, the amended regulation's "Internet plus" procedure, as explained above, will be more efficient and productive than the print media-only procedure.

Comments by Newspaper Industry Representatives

The most extensive comments expressing opposition to the proposed rule were submitted collectively by representatives of the newspaper industry.

Initially, it is noted that, in their collective comments, the newspaper industry representatives (hereinafter referred to as the "newspaper industry") acknowledged that publishing seizure and forfeiture notices through the Internet would be a positive development that would expand access to more people. The thrust of the newspaper industry's arguments is that Internet publication by itself does not provide adequate notice and should be employed only to supplement newspaper publication for maximum outreach, just as many newspapers have supplemented their print coverage with Internet publication. The specific newspaper industry comments are set forth and responded to in this subsection.

Comment: The representatives of the newspaper industry stated that Internet notice is an inadequate substitute for a printed, fixed newspaper notice. They contended that

government Internet web sites do not have a strong readership and that notice published in a newspaper is more likely to be read than notice published on the DOJ forfeiture Web site. They argued that access to the Internet remains limited, with minority, poor, and senior communities particularly underrepresented as Internet users and the sick, infirm, and residents of rural areas also facing limited access. They contended that Internet publication presents due process concerns for courts, historians, researchers, and archivists, and that, unlike newspapers, Internet publications are difficult to preserve and maintain in updated fashion without sufficient continuous funding. They questioned the ability of DHS to ensure that CBP will be appropriated adequate resources to both maintain use of the DOJ forfeiture Web site and publish notices in a print medium in special circumstances. They pointed to a government-wide initiative to eliminate agency web sites for budget reasons. They also questioned the proposed rule's conclusion that use of the DOJ forfeiture Web site will be "virtually cost-free" and faulted the proposal's failure to consider the cost and resources CBP will need to update, verify, manage, and secure notice information on the DOJ forfeiture Web site. They pointed out that government web sites have been attacked and temporarily removed, presenting security and accessibility issues. The newspaper industry concluded by asserting that the proposed regulation leaves substantial doubt about the manner and method of providing notice and creates potential gaps in information that should be available to the public.

CBP Response: Initially, CBP notes that any discussion regarding the effectiveness or reach of CBP's Internet forfeiture notice procedure must be informed by the fact that all known parties with an interest in the seized property will be notified directly in writing, with details of the seizure and forfeiture proceeding clearly explained. This notice will

cover most of those, and most often all of those, who will or may be affected by the forfeiture action. Remaining persons the procedure targets for notice are those not known to have an interest or those so known but unable to be located. With CBP's access to import information, and the cooperation of known interested parties, instances when there will be unknown interested parties, or such parties who cannot be located, will be few.

Regarding the newspaper industry's broad claim that Internet publication of forfeiture notices is inadequate, CBP disagrees. During the last decade, the Federal Government and many State governments have been continually gravitating toward more and more Internet publishing of important notices, announcements, and other information. In the Federal sphere, this trend is exemplified by the E-Government Act of 2002⁶ which generally requires and encourages Federal Government agencies to better manage and promote Internet and information technology use to bring about improvements in government operations and customer service. With this and other laws, Congress has demonstrated its interest in making government more efficient and effective through information technology. As discussed above, the growing trend in public sector Internet use was preceded by an explosion of Internet usage by private sector and other non-government entities over the last two decades. Thus, this expanding movement to Internet usage, inside and outside government, underscores the impressive success of the Internet as a medium that serves well the interests and purposes of its users. Contrary to

⁶ Pub. L. 107-347, 116 Stat. 2899. The E-Government Act of 2002 establishes in the Office of Management and Budget an Office of Electronic Government and imposes responsibilities on various high-level government officials including heads of Federal Government agencies. The Act defines "electronic Government" as "the use by the Government of web-based Internet applications and other information technologies, combined with processes that implement these technologies, to: (A) enhance the access to and delivery of Government information and services to the public, other agencies, and other Government entities; or (B) bring about improvements in Government operations that may include effectiveness, efficiency, service quality, or transformation." 44 U.S.C. 3601(3). While the Act does not mandate Internet publication of CBP's or other agencies' seizure and forfeiture notices, it evidences the inexorable movement to broader Internet use by the Federal Government under Congressional direction.

the newspaper industry's expression of "substantial doubt" concerning Internet publication of notices, this expanding use of Internet publishing indicates widespread acceptance of the medium, including acceptance by Congress, as an effective communications tool for both public and private purposes.

More specifically, regarding increasing Internet use by Federal Government agencies and, particularly, Internet use in forfeiture actions taken under Federal law, CBP notes Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the Supplemental Rules), a part of the Federal Rules of Civil Procedure, which became effective on December 1, 2006. The rule governs civil asset forfeiture actions in the Federal courts. Under Rule G(4)(a)(iv)(C) of the Supplemental Rules, the Federal Government may employ the option of providing public notice through the Internet rather than in a newspaper. This rule was adopted for criminal forfeiture cases as well.⁷ Thus, the use of Internet publishing for seizure and forfeiture notices has been adopted by the Federal courts. Significantly, the Advisory Committee on Civil Rules that drafted Rule G(4)(a)(iv)(C) acknowledged that the Internet, by its nature, provides far greater access to forfeiture notices than newspapers.⁸ In the Advisory Committee Note to Rule G, the Committee stated the following⁹:

Newspaper publication is not a particularly effective means of notice for most potential claimants. Its traditional use is best defended by want of affordable alternatives. Paragraph [(4)(a)(iv)(C)] of Supplemental Rule G contemplates a

⁷ According to the DOJ Web site, Rule 32.2(b)(6) of the Federal Rules of Criminal Procedure, which became effective on December 1, 2009, incorporated the forfeiture notice procedures of Rule G, including Internet publishing, for criminal judicial forfeitures.

⁸ Under the Rules Enabling Act, 28 U.S.C. 2071-2077, the Supreme Court prescribes general rules of practice and procedure for the Federal Courts, and, pursuant to the Act's procedures, advisory committees may be appointed to recommend new and amended procedural rules.

⁹ Report of Civil Rules Advisory Committee, 92 (May 17, 2004), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/reports/CV5-2004.pdf>; see also Fed. R. Civ. P. Supp. R. G Advisory Committee's Note.

government-created internet forfeiture site that would provide a single easily identified means of notice. Such a site would allow much more direct access to notice as to any specific property than [newspaper] publication provides.

With use of the Internet for publication of forfeiture notices firmly established by the Federal courts, DOJ amended its seizure and forfeiture regulations to, among other things, allow Internet publishing of forfeiture notices. The DOJ final rule (77 FR 56093; September 12, 2012), cited the Supplemental Rules' Internet publishing provision as a parallel to its amendment and submitted that publication of seizure and forfeiture notices through the DOJ forfeiture Web site provides the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the Drug Enforcement Administration, and the Federal Bureau of Investigation with an "effective and cost-efficient means of providing public notice of thousands of federal civil and criminal judicial forfeiture proceedings" (Id. at 56097). The DOJ reported impressive levels of usage by the public of the DOJ forfeiture Web site for the period the web site has been publishing these notices (Id.). Also, the Centers for Medicare & Medicaid Services (CMS) within the Department of Health and Human Services (HHS) published a rule (76 FR 26342; May 6, 2011) proposing to allow for Internet publishing, through State web sites, of required public notices announcing changes in methods and standards for setting payment rates. The HHS proposed rule indicated that the States were consulted and convinced CMS that Internet publishing "will reduce State costs and allow for a more efficient means to notify the public of changes to Medicaid payment methods and standards" (Id. at 26352).¹⁰ (A final rule has not yet been published.)

¹⁰ While the notice provided for in the HHS-CMS proposed rule is not directly analogous to the CBP seizure/forfeiture notice, as the former process does not involve private property interests and a deadline that can be harmful to a potential claimant if missed, the move to Internet publishing by HHS-CMS

This pattern of government entities changing to Internet publishing is supportive of CBP's effort to likewise update its seizure and forfeiture notice regulations, as well as its rationale that the Agency can reduce costs while meeting its obligation under applicable law to provide effective notice to the public. In this regard, CBP notes that due process requires only that "the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action." Dusenbery v. United States, 534 U.S. 161, 170 (2002) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, (1950)). This principle applies to direct notice and published notice procedures. United States v. Young, 421 Fed. Appx. 229, 231, 2011 WL 1206664 (3d Cir. Apr. 11, 2011). CBP believes that publication of forfeiture notices via the Internet, with its widespread and broad availability within and well beyond the limits of the local jurisdiction (site of the seizure), is clearly in compliance with this standard,¹¹

Regarding the newspaper industry's claim that certain segments of the public will be disenfranchised if notice is published through the Internet rather than a local newspaper, CBP is not convinced that the Internet would be less capable of providing access to forfeiture notices for minorities, senior citizens, the poor, rural residents, prison inmates, the ill and disabled in or outside of hospitals, etc., than would local newspapers. For any group of persons the newspaper industry claims will be disenfranchised, there is insufficient convincing evidence that Internet publication would be a disadvantage with respect to these groups as compared to newspaper publication. Moreover, the due

supports the view that government publication by Internet posting is cost advantageous, generally effective, and capable of reaching a wide audience.

¹¹ CBP believes that the Internet's ability to provide access to public forfeiture notices is, in this Internet era, much less limiting than that of local print publishing which has long been held to meet standards of due process.

process standard requires a means of notice reasonably calculated to apprise a party of the action; it does not require the most effective means of doing so, maximally tailored to each particular situation. It is reiterated that those targeted by notice through publication are unknown interested parties. CBP believes that Internet publication of forfeiture notices for this purpose constitutes a reasonable effort to provide notice to the general public, including the groups of society raised by the newspaper industry.

Regarding the newspaper industry's comments about costs, CBP iterates that replacing newspaper publishing with Internet publishing will reduce its advertising costs. As noted in its proposal, CBP spent over \$1 million in 2010 for advertising notices of seizure and forfeiture in newspapers. In contrast, providing notice through postings on the DOJ forfeiture Web site will cost CBP approximately \$25,000 per year (see the "Economic Analysis" section). This comparatively minor annual expense justifies the (figurative) description "virtually cost-free" and, in any case, represents a very substantial cost reduction. However, upon reexamining its costs, CBP recognizes that there are additional one-time costs to modify government systems that CBP did not include in the proposal's economic analysis. CBP has amended the "Economic Analysis" section in this final rule to add \$693,000 in up-front costs for the first year. CBP notes that, with these costs, CBP effectively (but not quite) breaks even in the first year the rule is in effect and experiences large savings each subsequent year.

Regarding the newspaper industry's reservations about appropriations and funds to maintain CBP's notice publications through the DOJ forfeiture web site and, at the same time, its publication of notices in newspapers in special circumstances, CBP is confident that funding will not be a concern, especially given the savings generated by

the switch to Internet publishing. There is no basis for supposing that this cost savings will result in budget decisions that undermine CBP's important fundamental policies. Likewise, CBP is not concerned that a government-wide reduction in agency web sites for budget purposes will result in the government closing down web sites that are critical to its enforcement mission.

Comment: The newspaper industry asserted that removing CBP seizure and forfeiture notices from newspapers would be against CBP's interest regarding the selling of seized and forfeited merchandise at auction. According to the newspaper industry, the published notices generate interest in the auction, and the absence of these notices would result in fewer bidders.

CBP Response: The procedure for publication of seizure and forfeiture notices and the procedure for conducting auctions of forfeited merchandise are not connected functions. CBP does not publish seizure and forfeiture notices to generate interest in an auction that may or may not take place at a later time and place. (It is noted that the final resolution of the case may render an auction unnecessary.) The notice contains no information about the auction procedure.¹² CBP is not concerned that its ability to auction seized and forfeited merchandise will be compromised and is confident that its auctions will continue to be conducted as successfully as in the past. The changes made in this document will have no effect on auction procedures or the advertising of auctions.

Comment: The newspaper industry asserted that Internet publication lacks four elements that ensure the validity of public notice. The publication must be: independently sourced, capable of being archived, accessible to the public, and verifiable. The

¹² CBP's auctions of forfeited merchandise are handled by the Treasury Executive Office for Asset Forfeiture, an office of the Treasury Department that administers the Treasury Forfeiture Fund. Under applicable procedures, a contractor is hired to take care of the auction and all related advertising.

newspaper industry claims that Internet publishing does not meet these elements to the disadvantage of the public.

CBP Response: First, CBP notes that these elements are not legal standards that an agency is required to meet under applicable law and regulation. The newspaper industry did not cite to a law or regulation for its proposition. CBP disagrees that notice must be independently sourced (that is, from outside the government) to be effective and reliable. DOJ and the Federal Rules of Civil Procedure administered by the Federal courts are in accord. The CBP seizure and forfeiture notice, whether published in the newspaper (currently) or on the DOJ forfeiture Web site (as adopted in this final rule), describes the property seized and the details of the seizure (time, place, reason) and informs a prospective claimant of the procedural options available to resolve the matter, including taking no action or electing either judicial or administrative proceedings. As set forth previously, CBP is satisfied that the published notice meets the requirements of due process whether published in a newspaper or on the DOJ forfeiture Web site. Regarding the archiving of records pertaining to the seizure/forfeiture action and the notice procedure, and verification of such records, CBP is confident that appropriate records will be maintained in accordance with applicable law, regulations, and procedures.¹³

Conclusion

Based on the foregoing analysis of the comments, and CBP's further consideration of the matter, CBP is adopting the proposed amendments as published in the **Federal Register** (77 FR 6527) on February 8, 2012 as final with a change to the regulatory text, as follows. CBP is adding to the regulation that the DOJ forfeiture Web

¹³ All records relating to CBP's processing of forfeiture cases will be stored in an official system of records maintained by CBP that meets the requirements of Presidential Circular A-127 (pursuant to the Federal Financial Management Improvement Act of 1996).

site address will be posted in a conspicuous place available to the public at all customhouses and sector offices. This posting will not provide case-specific information relative to seizures/forfeitures, but will inform any local persons visiting the customhouse or sector office of a means by which one may learn of these actions, including case-specific information. CBP also makes some slight editorial changes to the regulatory text to enhance general readability.

Economic Analysis

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866.

Accordingly, the rule has not been reviewed by the Office of Management and Budget. However, CBP has prepared the following analysis to help inform stakeholders of the potential impacts of this final rule’s amendments.

This final rule will provide a less costly alternative for publishing notices of seizure and forfeiture for seized property appraised at more than \$5,000 in value. The current regulation requires CBP to publish such notices in a local newspaper for at least three successive weeks. Historically, there have been some instances where the cost of

advertising exceeds the value of the seized property, and these occurrences have increased as the cost of newspaper advertising has increased.

Under this rule, CBP will publish the great majority of seizure and forfeiture notices for property valued at more than \$5,000 (estimated at 90 percent) for 30 consecutive days solely by posting on an existing U.S. Government Web site. In some cases, including at CBP's sole discretion based on the particular circumstances involved or where a court or a U.S. Attorney instructs or recommends, CBP will publish notice via both print (newspaper or other publication) and Internet methods. CBP will use an existing DOJ Web site that lists forfeiture actions by various Federal Government agencies at an approximate cost to CBP of \$25,000 per year in system maintenance and contract costs. In addition, CBP and DOJ will need to spend a total of \$693,000 in one-time costs to modify their systems as a result of this rule.

In 2010, CBP spent over \$1 million advertising more than 6,000 lines of property. Under this rule, CBP will advertise the vast majority of items using the DOJ forfeiture Web site. CBP will advertise a comparatively small number of items both on the Internet and in a traditional newspaper or other publication. Because these items will be the highest profile items, CBP will likely advertise these items in newspapers of large circulation or national newspapers. Such advertising will make up a disproportionate amount of the costs. CBP estimates that it will cost \$300,000 to continue to advertise these items in print. Therefore, CBP estimates that advertising on the Internet instead of in print for most items will save approximately \$700,000 per year in print advertising costs. The net effect of this change will be a loss to CBP of \$18,000 (\$700,000 savings - \$693,000 one-time system modification costs - \$25,000 recurring costs) in the first year

and a savings to CBP of \$675,000 (\$700,000 savings - \$25,000 recurring costs) in future years. Over a ten-year period of analysis, this final rule is estimated to save CBP over \$4 million at a 7% discount rate.

This rule also provides that CBP will publish seizure and forfeiture notices for seized property appraised at \$5,000 or less on the DOJ forfeiture Web site for 30 consecutive days. This change will simply add low-cost Internet publication to the current requirement that CBP post notice at the customhouse or U.S. Border Patrol sector office, as provided in this rule for seized property appraised at \$5,000 or less. This change will be virtually costless to the Government and will expand the reach of the seizure and forfeiture notice to the benefit of unknown parties-in-interest and the public.

Finally, under this final rule, CBP will post general information at all customhouses and sector offices, in the conspicuous place that lower-valued seizure and forfeiture notices are posted for public viewing, to inform the public that seizure and forfeiture notices, regardless of the value of the merchandise, will be posted to the DOJ forfeiture Web site. This will be done at de minimis cost to CBP.

Regulatory Flexibility Act

This section examines the impact of the final rule on small entities as required by the Regulatory Flexibility Act (5 U.S.C. 603), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit

organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

This final rule moves most notices of seizure and forfeiture valued at more than \$5,000 from local print media to a Federal Government forfeiture Web site. It also allows CBP to post notices of seizures and forfeitures valued at \$5,000 or less on the forfeiture web site in addition to posting at the customhouse nearest the place of seizure or the appropriate Border Patrol sector office. This rule does not impose any requirements on the general public or small businesses. As provided under the current procedure, CBP will continue to contact, in writing, any small business that is a known party-in-interest. Because this rule imposes no direct costs on small entities, we believe that this rule does not have a significant economic impact on a substantial number of small entities. Consequently, DHS certifies this rule does not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This final rule does not impose an unfunded mandate under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$100 million or more (adjusted for inflation), in the aggregate, to any of the following: State, local, or Native American Tribal governments, or the private sector.

Executive Order 13132

In accordance with the principles and criteria contained in Executive Order 13132 (Federalism), this final rule has no substantial effect on the States, the current Federal-

State relationship, or on the current distribution of power and responsibilities among local officials.

Signing Authority

This document is being issued in accordance with 19 CFR 0.1(b)(1).

List of Subjects in 19 CFR Part 162

Administrative practice and procedure, Law enforcement, Seizures and forfeitures.

Amendment to CBP Regulations

For the reasons set forth above, Part 162 of title 19 of the Code of Federal Regulations (19 CFR part 162), is amended as set forth below.

PART 162 – INSPECTION, SEARCH, AND SEIZURE

1. The general authority citation for part 162 and the specific authority citation for § 162.45 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1592, 1593a, 1624; 6 U.S.C. 101; 8 U.S.C. 1324(b).

* * * * *

Section 162.45 also issued under 19 U.S.C. 1607, 1608;

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2. In § 162.45, paragraphs (b)(1) and (b)(2) are revised to read as follows:

§ 162.45 Summary forfeiture; Property other than Schedule I and Schedule II controlled substances; Notice of seizure and sale.

* * * * *

(b) Publication. (1) If the appraised value of any property in one seizure from one person, other than Schedule I and Schedule II controlled substances (as defined in 21 U.S.C. 802(6) and 812), exceeds \$5,000, the notice will be published by its posting on an official Government forfeiture Web site for at least 30 consecutive days. Information pertaining to the Government forfeiture Web site will be posted in a conspicuous place that is accessible to the public at all customhouses and all sector offices of the U.S. Border Patrol. In CBP's sole discretion, and as circumstances warrant, additional publication for at least three successive weeks in a print medium may be provided. All known parties-in-interest will be notified in writing of the Government Web site address and the date of Internet publication (and pertinent information regarding print publication, when appropriate).

(2) In all other cases, except for Schedule I and Schedule II controlled substances (see § 162.45a), the notice will be published by its posting on an official Government forfeiture Web site for at least 30 consecutive days and by its posting for at least three successive weeks in a conspicuous place that is accessible to the public at the customhouse located nearest the place of seizure or the appropriate sector office of the U.S. Border Patrol. All known parties-in-interest will be notified in writing of the Government Web site address and the date of Internet publication (and pertinent information regarding print publication, when appropriate). The posting at the customhouse or sector office will contain the date of on-site posting. Articles of small value of the same class or kind included in two or more seizures will be advertised as one unit.

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Dated: January 23, 2013

Janet Napolitano,
Secretary.

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